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Youth as Victims and Offenders in the Criminal Justice System: A Charter Analysis — Recognizing Vulnerability

Nicholas Bala*

I. INTRODUCTION: RECOGNIZING THE SPECIAL NATURE OF YOUTH

Although it is not always well articulated by judges, the Canadian courts have recognized that youth¹ have a special status in the criminal justice system, one that is reflected in legislation and international law and that should also be reflected in the interpretation of the *Canadian Charter of Rights and Freedoms*.² Youth have limited capacities and greater vulnerability than adults, and are therefore given a special legal status. In the context of their relationships with police and in the youth courts, this has meant that judges have recognized that youth are entitled to special protections, and hence should be granted enhanced rights under the Charter compared to adults; the courts have also upheld the constitutional validity of legislation that affords youth special protections. In other contexts, however, the courts have held that the special vulnerability of youth means that adult caregivers, such as parents and school officials, have special powers in regard to them; accordingly, the Charter has also been interpreted in a way that has limited the *rights* of youth, in the belief that this is necessary to protect their *interests*.

This paper reviews some of the leading Charter decisions about youth in the criminal justice system, first examining cases in which youth are charged with offences, and then considering cases that deal with them as victims and witnesses. The focus will be on Charter jurisprudence, though

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¹ A note on terminology: in this paper, the term "child" will generally be used to refer to persons under the age of 12, and "youth" to refer to those 12 to 17 years inclusive. This is the way that the terms are generally used in Canada's criminal justice laws, most notably the *Youth Criminal Justice Act*, S.C. 2002, c. 1. In some contexts, however, the terms "youth" and "child" are used synonymously to refer to persons under the age of 18.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (hereinafter "the Charter").

there will be references to the United Nations *Convention on the Rights of the Child*,³ an international treaty that the Canadian courts have considered in interpreting the Charter and Canadian legislation.⁴

A number of significant constitutional decisions have recognized the vulnerability and special nature of youth, but the most important decision will only be rendered by the Supreme Court after this paper has been sent to the publisher, in a case dealing with the constitutional validity of provisions that create a presumption of adult sentencing for youth found guilty of certain very serious offences. Though there are intellectual risks in predicting how the Court will deal with issues, in this paper I argue that its prior decisions suggest that the Court will continue to recognize that youth is a distinct phase of life that is entitled to special recognition under the Charter by always placing an onus on the state to establish why a young offender should be treated as an adult.

II. YOUTH AS OFFENDERS

It is interesting to observe that the 1984 repeal of the *Juvenile Delinquents Act*,⁵ originally enacted in 1908 to deal with youths who violate the criminal law, was prompted in part by the coming into force of the Charter. The JDA created a highly discretionary juvenile justice regime which gave little attention to legal rights of youth. While the deficiencies of the JDA were becoming apparent by the mid-1960s,⁶ it was not until 1984 that the *Young Offenders Act*⁷ replaced the JDA. Soon after the Charter came into effect in 1982, parts of the JDA were subject to successful Charter challenge, and more challenges would have followed if the JDA had not been repealed.⁸ A strong impetus for the enactment of the YOA was the constitutional entrenchment of the Charter in 1982.

³ Can. T.S. 1992 No. 3.

⁴ The *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 has also been influential in the United States, which is not a signatory. The *Convention* was cited in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), where the United States Supreme Court held that imposing the death penalty on a person who was under the age of 18 at the time of committing a murder was “cruel and unusual punishment” and hence a violation of the American Constitution. This important decision recognized the vulnerability and special status of youth, relying in part on international law.

⁵ First enacted as S.C. 1908, c. 40; subject to minor amendments over the years, finally as *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 [hereinafter “JDA”].

⁶ See, e.g., Canada, Department of Justice, Report of the Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen’s Printer, 1965).

⁷ R.S.C. 1985, c. Y-1, enacted as S.C. 1980-81-82-83, c. 110 [hereinafter “YO”].

⁸ Nicholas Bala, “Constitutional Challenges Mark Demise of Juvenile Delinquents Act” (1983) 30 C.R. (3d) 245.

The informality and lack of legal rights for youths under the JDA were inconsistent with the legal protections recognized in the Charter, while the interprovincial variation allowed by the JDA for such issues as the commencement of adulthood was contrary to the equal protection of the law guaranteed by section 15 of the Charter.

The YOA established a uniform national age jurisdiction of 12 through to the 18th birthday, and provided much greater recognition for the legal rights of youth, developments consistent with the emphasis in the Charter on due process of law and equal treatment under the law.⁹ The YOA and its successor, the *Youth Criminal Justice Act*,¹⁰ which came into force in 2003, afford youth significant statutory protections, for example, in granting rights to youth during police questioning and for access to appointed counsel. These statutory rights reflect legislative recognition of the vulnerability of youth and of the need to treat their vulnerability in a fashion that promotes their rehabilitation. In a practical sense, in many situations involving youth, counsel and the courts do not have to explicitly consider the Charter, as Parliament has afforded youth substantial statutory protections beyond those guaranteed under the Charter.

1. A Constitutional Right for Youth Not to Be Treated as Adults?

In 2003, the Quebec Court of Appeal in *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*,¹¹ held that section 72(2) of the YCJA,¹² which places an “onus” on a youth found guilty of a “presumptive offence” to satisfy the court as to why an adult sentence should not be imposed, is unconstitutional, as it violates section 7 of the Charter. Two 2006 appellate judgments, *R. v. B. (D.)*¹³ of the Ontario Court of Appeal and

⁹ R.S.C. 1985, c. Y-1. Some critics have decried the increased emphasis on due process and legal rights. See, for example, J. Hackler, “An Impressionistic View of Canadian Juvenile Justice: 1965 to 1999” (2001) 20 Can. J. Comm. Mental Health 17, at 17-21, who writes that the enactment of the YOA represented:

a basic change . . . a transfer of influence from social workers to lawyers. Juveniles got certain legal protections, but we did not foresee that the juveniles and their families would become victims of the legal process. . . . The vast increase in the number of judges, prosecutors, defence lawyers and closed-custody institutions is the result of one profession, law, expanding into an area previously dominated by another, social work . . . but it is too late to go back. Lawyers have replaced social workers as the main players in juvenile justice.

¹⁰ S.C. 2002, c. 1, Royal Assent February 19, 2002, in force April 1, 2003 [hereinafter “YCJA”].

¹¹ [2003] J.Q. no 2850, 10 C.R. (6th) 281 (Que. C.A.) [hereinafter “*Québec c. Canada*”].

¹² S.C. 2002, c. 1.

¹³ [2006] O.J. No. 1112, 37 C.R. (6th) 265 (Ont. C.A.), leave to appeal allowed [2006] S.C.C.A. No. 195 (S.C.C.).

*R. v. T. (K.D.)*¹⁴ of the British Columbia Court of Appeal, came to opposite conclusions about the constitutionality of section 72(2). The question of the constitutional validity of this provision will be resolved by the Supreme Court of Canada when it renders its judgment on the Crown's appeal from the Ontario decision some time in 2008.¹⁵ That judgment is likely to be one of the most significant decisions related to youth in Canadian history, as the question of whether the Charter requires that youthful offenders are to be treated in a way that takes greater account of their needs than adult offenders is related to the fundamental question of whether the Charter requires distinctive treatment of youth.

Central to the arguments about the unconstitutionality of section 72(2) of the YCJA¹⁶ is the interpretative significance of the *Convention on the Rights of the Child*¹⁷ for section 7 of the Charter. Article 37 of the *Convention* deals with confinement of youth, emphasizing that custody is to be a "last resort and for the shortest appropriate period of time", while Article 40 establishes principles that are to govern responses to offending by "children" (all those under 18 years of age), placing an emphasis on rehabilitation. The *Convention* does not deal explicitly with the imposition of adult sentences for youth, though Article 37(a) prohibits capital punishment for those who were juveniles at the time of commission of an offence, and Article 37(c) specifies that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so." When Canada ratified the *Convention* it filed a reservation to Article 37(c), stipulating that it did not view itself as bound by this provision; the reservation was filed because the provisions of Canada's youth justice laws — both then and now — do not use a "best interests" test for determining whether a youth should be placed in custody with adults.¹⁸

¹⁴ [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

¹⁵ [2006] S.C.C.A. 195 (S.C.C.), appeal argued October 10, 2007. For a fuller discussion of some of the issues in this case, see Nicholas Bala, "Charter Challenges to Presumptive Adult Sentences for Serious Youth Offenders" (2006) 37 C.R. (6th) 287.

¹⁶ S.C. 2002, c. 1.

¹⁷ Can. T.S. 1992 No. 3.

¹⁸ Under s. 30(4) of the YCJA, S.C. 2002, c. 1, a youth may be detained with adults before adjudication if the youth court considers that this would be "in the best interests of the young person *or* in the public interest" (emphasis added). Under s. 76(2) a court may order a youth who is subject to an adult sentence and under 18 years of age is to be confined with adults, if this is considered by the court to be in the "best interests" of the youth *or* necessary for the "safety of others". Subsection 76(2) creates a presumption that a young person subject to an adult sentence will be placed in an adult facility once he or she reaches the age of 18 years.

The *Convention on the Rights of the Child*¹⁹ does not afford individual Canadian youth any remedies, or create directly enforceable rights. However, in its 1999 decision in *Baker v. Canada*,²⁰ the Supreme Court of Canada held that the *Convention* should be used to assist in the interpretation of legislation. Further, as will be discussed below, subsequent decisions of the Supreme Court make clear that the *Convention* may be cited to help interpret the Charter, in particular to give meaning to the “principles of fundamental justice”.

(a) *The Quebec Court of Appeal Decision*

Prior to the YCJA²¹ coming into effect, the Attorney General of Quebec brought a reference case before the Quebec Court of Appeal, arguing that some provisions of the YCJA, including those governing adult sentencing and the publication of identifying information about young offenders, are incompatible with international law and in violation of the Charter. In March 2003, a five-judge panel of the Court of Appeal rendered its decision in *Québec c. Canada*,²² holding that the “principles of fundamental justice” in section 7 of the Charter include the right of juveniles to treatment separate from adults. The Court based its approach to section 7 of the Charter both on the long history of special treatment of juvenile offenders in the Canadian justice system and on international law, in particular the *Convention on the Rights of the Child*.²³ The Court ruled that the “principles of fundamental justice” include recognition that:

- (1) The treatment of young offenders in the criminal justice system must be separate and different from the treatment of adults.
- (2) Rehabilitation, not repression and deterrence, must be the basis of legislative and judicial intervention involving young offenders.
- (3) The youth justice system must restrict disclosure of the identity of minors in order to prevent stigmatization, which could limit rehabilitation.

¹⁹ Can. T.S. 1992 No. 3.

²⁰ [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

²¹ S.C. 2002, c. 1.

²² *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] J.Q. no 2850, 10 C.R. (6th) 281 (Que. C.A.).

²³ *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] J.Q. no 2850, 10 C.R. (6th) 281, at paras. 3 and 231 (Que. C.A.). *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

- (4) The youth justice system must consider the best interests of the child.²⁴

Some of these principles are very broad (and, as discussed below, the fourth seems inconsistent with subsequent Supreme Court jurisprudence), but the Quebec Court of Appeal limited the effect of these principles by engaging in an internal balancing exercise within section 7 when applying them. Consistent with prior Supreme Court of Canada section 7 Charter jurisprudence,²⁵ the Court of Appeal held that these principles must be applied so as to strike a “certain balance” between the public’s right to be protected and the right of young people to be treated differently from adults and to have rehabilitation as the main focus of decisions that concern them.²⁶

The Quebec Court of Appeal ruled unconstitutional section 72(2) of the YCJA,²⁷ which places an onus on youths 14 years of age or older, and found guilty of a “presumptive offence”, to justify why they should be sentenced as youths rather than as adults. The Court concluded that this provision places an “excessive burden [on youth], considering the vulnerability of the young persons on whom it rests and the purposes” of the YCJA.²⁸ While the Court accepted that, in some very serious youth cases, an adult sentence may be appropriate, the Court held that section 7 of the Charter requires that in every case the onus should be on the Crown to justify the denial of youth status.

In May 2003, in response to the Quebec Court of Appeal judgment, the then federal Liberal government announced that the decision would not be appealed, and that the government would “soon” introduce amendments to the YCJA²⁹ to make the Act consistent with that decision. The purpose of these amendments would have been to ensure a uniform

²⁴ *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] J.Q. no 2850, 10 C.R. (6th) 281, at paras. 215 and 231 (Que. C.A.).

²⁵ See *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.). The concept of “internal balancing” is distinguished from the “external balancing” that results when s. 1 of the Charter is invoked.

²⁶ *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] J.Q. no 2850, 10 C.R. (6th) 281, at para. 237 (Que. C.A.).

²⁷ S.C. 2002, c. 1.

²⁸ *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] J.Q. no 2850, 10 C.R. (6th) 281, at para. 249 (Que. C.A.). The Court of Appeal also held that s. 110(2)(b) of the YCJA, S.C. 2002, c. 1 which allows courts to permit identifying publicity about youths convicted of presumptive offences but who receive youth sentences rather than adult sentences, violates s. 7 of the Charter.

²⁹ S.C. 2002, c. 1.

national response, and to resolve procedural issues about how and when an adult sentence can be imposed. In fact, legislative amendments were *not* introduced, and this type of legislative reform will not be considered until after the Supreme Court deals with this issue.

(b) *The British Columbia Court of Appeal: R. v. T. (K.D.)*

In its January 2006 decision in *R. v. T. (K.D.)*,³⁰ the British Columbia Court of Appeal declined to follow the decision of the Quebec Court of Appeal, and upheld the constitutional validity of section 72(2), placing an onus on a youth to justify not having an adult sentence in a manslaughter case. The British Columbia Court held that section 7 of the Charter does not include as a principle of fundamental justice that young offenders are presumptively to be treated differently from adults. In the case before the Court, it reversed the trial judge and concluded that the youth should receive an adult sentence.

One important reason that the British Columbia Court gave for rejecting the approach of the Quebec Court³¹ was that the fourth “principle of fundamental justice” which the Quebec Court recognized, that the youth court system must make decisions that “consider the best interests of the child”, is inconsistent with the 2004 decision of the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada*.³² In that decision, McLachlin C.J.C. wrote for the majority, upholding the constitutional validity of section 43 of the *Criminal Code*,³³ which authorizes use of reasonable force for the purpose of the correction of children. In the course of her judgment, she concluded that requiring decisions to be made in accordance with the “best interests of the child” is *not* a principle of fundamental justice.

While it is true that this fourth principle — the best interests principle — was rejected by the Supreme Court in *Canadian Foundation for Children*,³⁴ the Quebec Court did not even mention this particular principle in dealing with the Charter challenges to sections 72(2) and 110(2), but rather focused on the first two of the principles — that youths must be

³⁰ [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

³¹ *R. v. T. (K.D.)*, [2006] B.C.J. No. 253, 37 C.R. (6th) 243, at para. 29 (B.C.C.A.).

³² [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) [hereinafter “*Canadian Foundation for Children*”].

³³ R.S.C. 1985, c. C-46.

³⁴ *Canadian Foundation for Children, Youth and the Law*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

treated separately from adults and in a way that focuses on their rehabilitation.

Another argument that the British Columbia Court of Appeal considered significant is that section 72(2) of the YCJA³⁵ does not place an onerous burden on the convicted youth. The British Columbia Court quoted from an Ontario trial decision (now overruled in Ontario), *R. v. L. (D.)* (No. 2), where Duncan J. wrote:

... the significance of onus in the scheme under consideration can be over-stated. At the end of the day, the Court will either be satisfied that an appropriate sentence can be achieved under the youth system or that it can not — and will decide accordingly.³⁶

In taking this approach to section 72(2), both the British Columbia Court of Appeal and Duncan J. in *R. v. L. (D.)* (No. 2)³⁷ placed significant emphasis on an interpretation given to the transfer provision of the YOA³⁸ by the Supreme Court of Canada in its 1989 decision in *R. v. M. (S.H.)*, where McLachlin J. wrote:

I share the view that application of the concepts of burden and onus to the transfer provisions of the *Young Offenders Act* may not be helpful.

.....

Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. ... But it is less helpful to ask oneself whether a young person should be tried in ordinary court “on a balance of probabilities”. One is not talking about something which is probable or improbable when one enters into the exercise of ... weighing and balancing all the relevant considerations, [to decide whether] ... the case should be transferred to ordinary court.³⁹

It is submitted that this passage is not relevant for deciding about the interpretation or constitutionality of section 72(2) of the YCJA,⁴⁰ since the Court in *R. v. M. (S.H.)* was discussing the 1984 version of the YOA, which placed no onus on any party at a transfer hearing, but simply

³⁵ S.C. 2002, c. 1.

³⁶ [2005] O.J. No. 3183, at para. 12 (Ont. C.J.), *per* Duncan J. Quoted at para. 58 by the British Columbia Court of Appeal in *R. v. T. (K.D.)*, [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

³⁷ *R. v. L. (D.)* (No. 2), [2005] O.J. No. 3183 (Ont. C.J.).

³⁸ R.S.C. 1985, c. Y-1.

³⁹ [1989] S.C.J. No. 93, 50 C.C.C. (3d) 503, at 546 (S.C.C.), quoted by the Court of Appeal in *R. v. T. (K.D.)*, [2006] B.C.J. No. 253, 37 C.R. (6th) 243, at para. 59 (B.C.C.A.).

⁴⁰ S.C. 2002, c. 1.

stated that the youth court was to be “satisfied” that transfer should occur. It was only in 1995 that the YOA was amended to introduce the concept of “onus”,⁴¹ and, in regard to the most serious presumptive offences, to place an onus on youth to satisfy the court why a youth should not be tried as an adult. It is that onus provision, continued in the YCJA section 72(2), which is the subject of controversy.

It is true that in practice, even if the onus is on the Crown, in most cases the youth is still likely to adduce evidence about his background and character, and to attempt to establish that he is likely to be rehabilitated within the youth justice system. It would seem wrong to place any reliance on the fact that in some cases the issue of onus may be practically insignificant. There are clearly cases in which the issue of onus may be determinative, and *R. v. T. (K.D.)*⁴² may well be one of them. It is notable that in *R. v. T. (K.D.)* the trial judge found that section 72(2) was unconstitutional, placed an onus on the Crown, and decided not to impose an adult sentence, while the Court of Appeal upheld the constitutionality of the provision, placed an onus on the youth, and imposed an adult sentence.

(c) *The Ontario Court of Appeal: R. v. B. (D.)*

Just six weeks after the British Columbia Court of Appeal decision in *R. v. T. (K.D.)*,⁴³ the Ontario Court of Appeal rendered its contrary decision in *R. v. B. (D.)*,⁴⁴ agreeing with the 2003 Quebec Court of Appeal ruling that section 72(2) of the YCJA⁴⁵ violates section 7 of the Charter. The Ontario decision discussed the importance of the section 72(2) onus, concluding that it is “significant”, involving both a tactical onus of adducing evidence and a burden of persuasion, and observing that for presumptive offences, the Crown might succeed in having an adult sentence imposed even if it introduced no evidence or argument to

⁴¹ YOA, R.S.C. 1985, c. Y-1, s. 16(1.1), as enacted by S.C. 1995, c. 19.

⁴² [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

⁴³ [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

⁴⁴ [2006] O.J. No. 1112, 37 C.R. (6th) 265 (Ont. C.A.). The Ontario decision also followed the Quebec judgment in ruling that s. 110(2) of the YCJA, S.C. 2002, c. 1 violates the s. 7 Charter rights of a youth, by imposing on the youth found guilty of a presumptive offence but not subject to adult sanction the onus to justify a ban on the publication of identifying information. Although not mentioned by the Ontario Court, publication of identifying information about young offenders not only stigmatizes them, it may also make their rehabilitation more difficult, making a s. 1 argument even more difficult for this provision.

⁴⁵ S.C. 2002, c. 1.

justify this result.⁴⁶ The Ontario Court of Appeal also rejected the argument of the Crown that section 1 of the Charter could be invoked to save this provision, noting that the Crown conceded that it faces a very significant onus in trying to save any impugned provision under section 1 if it is found to violate section 7 of the Charter.⁴⁷

While the outcome of the constitutional challenge was the same in the Ontario and Quebec Court of Appeal decisions, the Ontario judgment is narrower, both in its scope and in its analysis. The Ontario Court recognized that the 2004 decision of the Supreme Court in *Canadian Foundation for Children*⁴⁸ had an impact on how section 7 of the Charter should be applied. As noted by the Ontario Court of Appeal, the Supreme Court held that in deciding what constitutes a principle of fundamental justice, consideration must be given both to the “traditions that [establish] the basic norms for how the state deals with its citizens” and to international law.⁴⁹ The Ontario Court concluded that both of these factors support the principle that young offenders are to be treated differently from adults, and place a burden on the Crown to justify the imposition of an adult sentence.

The Supreme Court decision in *Canadian Foundation for Children*,⁵⁰ however, rejected the argument that the “best interests of the child” is a Charter-protected principle of fundamental justice. This clearly calls into question the fourth principle of fundamental justice articulated by the Quebec Court of Appeal, that the “youth justice system must consider the best interests” of a young offender. However, as noted above, although that principle was articulated by the Quebec Court of Appeal, it was not relied upon by that Court in its constitutional analysis, nor was it even mentioned by the Ontario Court of Appeal.

The caution of the Ontario Court in not endorsing all of the Quebec Court’s analysis reflects an appreciation of the significance of the

⁴⁶ *R. v. B. (D.)*, [2006] O.J. No. 1112, 37 C.R. (6th) 265, at para. 35 (Ont. C.A.); see also para. 68.

⁴⁷ *R. v. B. (D.)*, [2006] O.J. No. 1112, 37 C.R. (6th) 265, at paras. 81-83 (Ont. C.A.).

⁴⁸ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁴⁹ *R. v. B. (D.)*, [2006] O.J. No. 1112, 37 C.R. (6th) 265, at para. 52 (Ont. C.A.), quoting from para. 8 of the Supreme Court of Canada decision in *Canadian Foundation for Children, Youth and the Law*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁵⁰ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

Supreme Court decision in *Canadian Foundation for Children*,⁵¹ and may reflect a desire to dissociate itself from some of the expansive discussion in the Quebec decision about the interpretation of the sentencing provisions of the YCJA⁵² in a way that is consistent with the “best interests” of the child.

(d) *The Supreme Court and the Convention*

The Supreme Court of Canada has granted the Crown leave to appeal *R. v. B. (D.)*;⁵³ the appeal was argued in October 2007 and a decision is expected some time in 2008. While there is always risk in predicting how the Supreme Court will resolve a controversial issue, previous decisions of the Supreme Court appear more consistent with the approach of the Ontario Court of Appeal. At very least, it is clear that the Supreme Court accepts the *Convention on the Rights of the Child*⁵⁴ as an important part of international law that should be used to help interpret and apply both Canada’s youth justice laws and the Charter. It would further appear that the Court is sympathetic to the argument that Canada’s young offenders should be treated differently from adults.

In its 2004 decision in *Canadian Foundation for Children*,⁵⁵ the Supreme Court dealt with a Charter-based challenge to section 43 of the *Criminal Code*,⁵⁶ a provision which allows parents to use “reasonable force” for the purposes of correction. In the majority judgment of McLachlin C.J.C., it is clear that she considers the *Convention on the Rights of the Child*⁵⁷ to be highly significant to the interpretation of section 7 of the Charter. In October of 2005 in *R. v. C. (R.)*,⁵⁸ the Supreme Court held that youth status is a factor that may be taken into account when a court is deciding whether, pursuant to *Criminal Code* section 487.051(2), to order a DNA sample from a youth found guilty of an offence, even in the absence of any explicit provision to this effect in

⁵¹ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁵² S.C. 2002, c. 1.

⁵³ September 28, 2006, [2006] S.C.C.A. 195 (S.C.C.).

⁵⁴ Can. T.S. 1992 No. 3.

⁵⁵ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁵⁶ R.S.C. 1985, c. C-46.

⁵⁷ Can. T.S. 1992 No. 3.

⁵⁸ [2005] S.C.J. No. 62, [2005] 3 S.C.R. 99 (S.C.C.).

either the Code or the YCJA.⁵⁹ Writing for a majority of the Court, Fish J. noted that the Preamble of the YCJA specifically acknowledges that Canada is a party to the *Convention*, and commented on the importance of international law in defining the rights of youth:

In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. *In keeping with its international obligations*, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible: see the United Nations *Convention on the Rights of the Child* ... incorporated by reference in the *Y.C.J.A.*⁶⁰

(emphasis added)

In December 2005 in *R. v. D. (C.)*,⁶¹ the Supreme Court of Canada interpreted the concept of “violent offence” in section 39(1)(a) of the YCJA⁶² in a way that restricts the use of custody for young offenders, concluding that this provision could not be invoked to sentence to custody a youth who was found guilty of dangerous driving in a stolen vehicle after a high-speed police chase. Writing for a majority of the Court, Bastarache J. again referred to the *Convention on the Rights of the Child*⁶³ as an “important” instrument for interpreting the YCJA,⁶⁴ suggesting that the Court may give significant weight to the *Convention* in dealing with adult sentencing as well.

These decisions all support the view that the Court will be influenced by the *Convention on the Rights of the Child*⁶⁵ in interpreting the Charter, and seems likely to be sympathetic to the argument that there is constitutional justification for a presumption that youth should be treated differently from adults.

⁵⁹ S.C. 2002, c. 1.

⁶⁰ [2005] S.C.J. No. 62, [2005] 3 S.C.R. 99, at para. 41 (S.C.C.).

⁶¹ [2005] S.C.J. No. 62, [2005] 3 S.C.R. 99 (S.C.C.).

⁶² S.C. 2002, c. 1.

⁶³ Can. T.S. 1992 No. 3.

⁶⁴ *R. v. D. (C.)*, [2005] S.C.J. No. 62, [2005] 3 S.C.R. 99, at para. 35 (S.C.C.). Other recent decisions of the Supreme Court have also recognized the importance of international law in interpreting and applying the Charter; see, e.g., *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.).

⁶⁵ Can. T.S. 1992 No. 3.

(e) *Responding to Serious Youth Offending in a Constitutionally Acceptable Way*

Some adolescents commit very violent crimes; their impulsiveness, lack of foresight and limited moral development can result in callous, senseless acts that have tragic consequences and understandably shock the community. Fortunately, these acts are relatively rare; however, the relative infrequency of these acts, and their sometimes brutal nature, contribute to the heightened media and public attention they receive when they do occur. There are youths, few in number, who have committed the most serious offences, and for whom accountability and protection of the public may require an adult length of sentence, and perhaps even a lifetime in custody.

It must, however, be appreciated that adolescents who end up serving all, or a portion, of their sentences in adult correctional facilities may pose a greater risk of re-offending than those who serve their entire sentences in the youth system.⁶⁶ Further, the limited moral and psychological development of adolescents requires that the justice system should hold them less accountable than adults who commit the same offences. This suggests that the legal regime for young offenders should reserve an adult sentence for exceptional cases, and should place an onus on the prosecution to justify this type of sanction. Placing an onus on the prosecution to justify an adult sentence seems most consistent with Canada's obligations under international law and the Charter.

The unfortunate reality is that those youths who commit the most serious and senseless crimes are precisely those who lack foresight and judgment, and who will not likely be deterred by adult sentences. Adult sentencing for the most violent of young offenders may be justified on accountability principles, but it will not produce a safer society. A reduction in serious violent offending cannot be achieved by a "legislative quick fix", but rather requires a resource-intensive combination of preventative, enforcement and rehabilitative services.

⁶⁶ See, e.g., D.M. Bishop *et al.*, "The Transfer of Juveniles to Criminal Court: Does It Make a Difference?" (1996) 42 *Crime & Delinquency* 171; R.E. Redding, "Recidivism rates in juvenile versus criminal court" (2000) Charlottesville, VA: Institute of Law, Psychiatry, & Public Policy, University of Virginia online: <http://www.ilppp.virginia.edu/Juvenile_Forensic_Fact_Sheets/RecidRates.html>.

2. Police Stops for a “Chit Chat”: Detention and Search

While there is controversy about the extent of racial profiling by police, there is no doubt that “age profiling” frequently occurs: adolescents are much more likely to be stopped by the police than are adults.⁶⁷ This may in part reflect the fact that youth are more likely to be out at night on the streets and in other “high crime” public places, but there is also undoubtedly a degree of stereotyping by police, who are aware that criminal activity peaks in late adolescence and early adulthood. While age profiling may result in police apprehending some youth offenders, it also results in the harassment of many innocent youth and increases youth distrust of the police. Further, this police action may result in unconstitutional searches and questioning of youth by police.

The concerns about violations of the rights of youth as a result of police practices are illustrated by the Ontario case of *R. v. D. (J.)*.⁶⁸ At about 11 p.m. one night in December 2004, two Toronto police officers observed three visible-minority youths wearing dark baggy clothes walking down the street in a “high crime area”. The police decided to stop the youths for what they referred to as a “chit chat”. The officers had no basis for stopping these youths, and were not investigating a crime, but rather did this as part of “proactive policing in a high crime area”. The officers stopped the boys and said something like: “Guys, stop for a second, we want to talk to you.” They asked the boys their names and birth dates, and did a Canadian Police Information Centre (“C.P.I.C”) search, discovering that one of the youths was in violation of the terms of his bail conditions. The police then arrested this youth, searched him and found him in possession of a replica handgun. They then arrested and searched the other two youths, and found various items including a crowbar in a knapsack carried by one of them. All three were initially charged with possession of burglary tools, though the Crown withdrew charges against the youth who did not have any items on his person or in his knapsack.

At a *voir dire* on the admissibility of the items seized, the police acknowledged that the boys were not told that they could refuse to respond to questions. The youth who was not on bail testified that he was “frequently” stopped and questioned by the police, once or twice a week, and that he did not feel that he was free to leave, nor did he feel

⁶⁷ See, e.g., J. Waddington, K. Stenson & D. Don, “In Proportion: Race, and Police Stop and Search” (2004) 44 *Brit. J. Crim.* 889.

⁶⁸ [2007] O.J. No. 1365 (Ont. C.J.), *per* P.J. Jones J.

that he had any option but to answer the officers' questions. One of the officers testified:

that it was his practice to ask an individual's name and birth date when he was "investigating" them. In cross examination he agreed that in this situation, he was "investigating" the three boys for being in the area. "My suspicion was based on the circumstances which I explained to you before: the late hour, the fact that they were all dressed in black, *the fact that they were all youths*. My suspicion was that they were up to — let me put it rashly — no good."⁶⁹

(emphasis added)

This statement reflects common police attitudes, but is also quite astonishing. Imagine if the officer admitted that a reason for stopping the youths was not their age, but their race! Justice Jones concluded that the police had not violated the Charter rights of the youth who was in violation of the terms of his bail order and had possession of a replica handgun. Regarding the other youth, she concluded that there had been a violation of his rights under both section 8 (to be free from "unreasonable search") and section 9 ("unlawful detention"). In the course of ruling that the admission of the evidence obtained would bring the administration of justice into disrepute and hence should be excluded under section 24(2) of the Charter, she placed significant emphasis on the fact that the case involved youth:

The practice by the police of obtaining identifying personal information from individuals, *especially young people*, where no crime is being investigated and there are no reasonable grounds to detain, with the intention of conducting a C.P.I.C. search ...without explaining to that person his right to refuse to provide that information or the jeopardy he or she faces by providing that information, amounts, in my opinion, to an abuse of police powers. This is particularly concerning when one considers that *young persons*, who are typically the target of these policing practices, have been granted enhanced procedural protections ... under the *Youth Criminal Justice Act* because of their age and stage of development. ...

... [T]he constitutional violation occasioned by the arbitrary detention of J.D. was significant. In reaching that assessment, I bear in mind not only the direct impact on the rights of J.D. of "pro-active policing", but the potential impact on the constitutional rights of the

⁶⁹ *R. v. D. (J.)*, [2007] O.J. No. 1365, at para. 80 (Ont. C.J.).

indeterminate number of young people who may have been subjected to the same arbitrary detention and questioning in the name of this police initiative ...

Most importantly, the significance of ... institutional failures, in assessing police conduct, particularly where an institutional policy effectively drives a pattern of legal non-compliance, cannot be underestimated ...⁷⁰

(emphasis added)

Youth are particularly vulnerable to police harassment as they are often unaware of their rights, are easily intimidated by the police and are frequently in public places. Decisions like *R. v. D. (J.)*⁷¹ are important, as they provide constitutional protections for the integrity of youth while they are walking down the street. Some aspects of the analysis of Jones J. in *D. (J.)* may have to be reassessed in light of the recent Ontario Court of Appeal decision in *R. v. B. (L.)*.⁷² While a full analysis of that controversial appellate decision is beyond the scope of this paper (and appears elsewhere in this volume), that decision would suggest that police may have a “chat” with a youth that may include asking the youth for name and birth date while a C.P.I.C. check is being run without the youth being “detained” under section 9 of the Charter. It is, however, submitted that *B. (L.)* can be distinguished from *D. (J.)*, as the youth in *D. (J.)* did testify and explain that when he was stopped by the police, he felt “psychologically detained”, while the youth in *B. (L.)* did not testify at the *voir dire* and actually approached the officers to strike up a conversation. It is also important to note that in *B. (L.)* Moldaver J.A. accepted that youth should be a factor in deciding whether detention occurred:

⁷⁰ *R. v. D. (J.)*, [2007] O.J. No. 1365, at paras. 87-89 (Ont. C.J.). Justice Jones also quoted Laforme J. in *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65, at 77-78 (Ont S.C.J.):

It needs repeating once again: Stopping and investigating people merely because of some “Spidey sense” being engaged goes far beyond the standards our society demands and expects of our police. Young people have the right to “just hang out”, especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent. Mere hunches do not give the police the grounds to “surprise” a group of young people, or to “get right on them” for investigative purposes without something further that provides a lawful basis for doing so.

See also *R. v. Suberu*, [2007] O.J. No. 317, 85 O.R. (3d) 127, at para. 61 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.), where Doherty J.A. suggested that age should be a factor in the application of s. 24(2) of the Charter when deciding whether to exclude an incriminating statement given to the police in violation of Charter rights.

⁷¹ *R. v. D. (J.)*, [2007] O.J. No. 1365 (Ont. C.J.).

⁷² [2007] O.J. No. 3290 (Ont. C.A.).

The respondent's conduct in approaching the officers hardly fits the image of a *frightened youth* who felt psychologically compelled to submit to the police in deprivation of his liberty. On the contrary, it speaks to a street-wise teenager who quickly sized up the situation and determined that his best defence in the circumstances was a strong offence. Put simply, this was not a case of psychological compulsion exerted by the police; it was a case of psychological control attempted by the respondent.⁷³

(emphasis added)

The ultimate outcome in *B. (L.)* may well be justifiable, in particular its application of section 24(2) of the Charter to a situation where a loaded handgun was seized from a youth on school property. It is, however, submitted that in dealing with the issue of whether detention of a youth has occurred, *B. (L.)* should not be extended to cases in which the police have stopped a youth. Otherwise, there will be an invitation to police to stop and question an "indeterminate number of [innocent] young people" undermining the respect of youth for the justice system and the rules of society. Further, it is submitted that in applying section 24(2), courts should take into account that the person whose rights were violated is a youth.

3. Police Investigations and Questioning: Statutory and Constitutional Rights

Parliament, recognizing the vulnerability of youth, enacted various provisions of the YCJA⁷⁴ to provide youths who are arrested with significant rights and protections that are not afforded to adults. As soon as a youth is arrested, the police⁷⁵ must inform the youth of the right to consult a lawyer.⁷⁶ Further, section 146(2) of the YCJA (and before that the YOA⁷⁷ section 56(2)) provides that if a statement of a youth to the police is to be admitted in evidence, there is an onus on the Crown to establish on the balance of probabilities that the questioning police officer gave the youth a clear explanation of his or her rights. This includes an

⁷³ *R. v. B. (L.)*, [2007] O.J. No. 3290, at para. 62 (Ont. C.A.).

⁷⁴ S.C. 2002, c. 1.

⁷⁵ The obligation to caution a youth about rights applies to any "person in authority" and may extend to a probation officer or youth worker, especially one who is the employee of a police service even if not a police officer: see *R. v. F. (N.R.)*, [2004] B.C.J. No. 1287 (B.C. Prov. Ct.), *per* Romilly Prov. Ct. J.

⁷⁶ See YCJA, S.C. 2002, c. 1, s. 25.

⁷⁷ R.S.C. 1985, c. Y-1.

explanation of the right to silence, and the right to consult and have present during questioning a parent and a lawyer, as well as an explanation of the fact that any statement made by the youth may be used in evidence at trial. The explanation must be in language “appropriate to the youth’s age and understanding”. If any rights are to be waived, especially if there is waiver of the right to counsel: “Not only must the waiver be clear and unequivocal, but [the youth’s] understanding must also be full and complete.”⁷⁸ If a youth expresses a wish to contact a lawyer, police must cease questioning the youth and use reasonable efforts to assist the youth in contacting a lawyer.⁷⁹

The statutory rights afforded youths at the time of questioning by the police under the YCJA⁸⁰ section 146(2) are significantly broader than the rights afforded under the Charter, and the onus is on the Crown to prove beyond a reasonable doubt that the youth was given an adequate explanation of his or her rights, and that the statement was voluntary. Further, the Crown must establish on the balance of probabilities the validity of any waiver of rights under section 146(4),⁸¹ and a violation of section 146(2) will result in the exclusion of the statement unless there was a mere “technical irregularity”. By way of contrast, if a Charter breach is alleged, the onus is on the youth to establish a violation on the balance of probabilities, and even if there is a breach, the statement may still be admitted if doing so would not bring the administration of justice into disrepute.

For these reasons, although there is a great deal of case law in which youth challenge the admissibility of statements made by them to “persons in authority”, most cases are argued under the YCJA⁸² and the common law voluntariness standard. There are, however, some important cases involving youth and a violation of the Charter rights by police during questioning of a youth. Most notable is the 1993 Supreme Court decision in *R. v. I. (L.R.)*,⁸³ where the Supreme Court took account of the “young offender context” in interpreting section 10 of the Charter and ruled inadmissible two confessions to a police officer made by a youth in regard to a homicide. Of significance for present purposes, the Court held that

⁷⁸ *R. v. K. (O.)*, [2004] B.C.J. No. 1458, at para. 96 (B.C. Youth. Ct.), *per* McKinnon Yth. Ct. J.

⁷⁹ *R. v. B. (D.R.)*, [2004] B.C.J. No. 1092 (B.C. Youth Ct.).

⁸⁰ S.C. 2002, c. 1.

⁸¹ *R. v. H. (L.T.)*, [2006] N.S.J. No. 409 (N.S.C.A.), leave to appeal allowed, [2006] S.C.C.A. No. 509 (S.C.C.).

⁸² S.C. 2002, c. 1.

⁸³ [1993] S.C.J. No. 132, [1993] 4 S.C.R. 504 (S.C.C.).

if a youth faces a very serious charge, his waiver of the right to counsel guaranteed by section 10 of the Charter is valid only if the “young person is aware of the consequences of his or her actions, including the possibility of being raised to adult court”.⁸⁴ This Supreme Court decision clearly recognized the special vulnerability of youth, imposing obligations on the police to give youths charged with the most serious offences and facing the possibility of an adult sanction a special caution.

There have also been a few cases that have raised Charter issues concerning police investigative practices regarding youths in situations where a violation of the Charter resulted in the police obtaining physical evidence implicating the youth. In *R. v. R. (G.M.)*⁸⁵ the Nova Scotia Court of Appeal, citing *R. v. I. (L.R.)*,⁸⁶ upheld a youth court decision that excluded fingerprint evidence obtained after a violation of the youth’s right to consult counsel. While the youth consulted with his mother, the Court emphasized that he also had the right to consult counsel, and this right was “crucial” and “distinct” from the right to consult with a parent, and was not waived.

In *R. v. A. (A.)*,⁸⁷ the Court considered the admissibility of evidence obtained by the police after entry into an apartment occupied by four youths. The police knocked on the door and asked to be admitted, and one of the youths let them in without comment. The officers questioned the youths, without advising them of their rights, extensively searched the apartment and seized an item that was physical evidence of criminal negligence causing bodily injury, the criminal act under investigation. Justice Flaherty emphasized that the youths were not aware of their rights, and no effort was made to contact their parents. He ruled that the entry was unlawful and violated section 8 of the Charter:

To waive a constitutionally protected right it’s trite law that you have to be aware of the right to and of the consequences of, consenting or refusing. If you’re consenting there has to be clear and cogent evidence of that consent. Mere acquiescence is not consent. On these facts consent to enter these premises was never sought. In any event, it wasn’t given, or acquiesced in.⁸⁸

⁸⁴ *R. v. I. (L.R.)*, [1993] S.C.J. No. 132, [1993] 4 S.C.R. 504, at 524 (S.C.C.), *per* Sopinka J.

⁸⁵ [1993] S.C.J. No. 132, [1993] 4 S.C.R. 504 (S.C.C.).

⁸⁶ [1994] N.S.J. No. 566 (N.S.C.A.).

⁸⁷ [2003] O.J. No. 5137 (Ont. C.J.).

⁸⁸ [2003] O.J. No. 5137, at para. 13 (Ont. C.J.).

Invoking section 24(2) to rule the evidence inadmissible, Flaherty J. noted that there were no “exigent circumstances” that justified a warrantless entry, and no effort to obtain the permission of a parent or guardian for entry into the apartment and for conducting a search.

In cases involving the obtaining of breathalyzer samples, however, the courts have not been very sympathetic to the argument that special protections should be afforded youths under the Charter section 10. In *R. v. E. (G.)*, Ross J. observed:

I am also not satisfied that [a] ... case in which a young driver faces a charge of driving while his blood-alcohol content was in excess of the legislated level, requires extraordinary measures to protect the constitutional rights of young persons. It is not the same situation as where a young person is being questioned by the authorities. In that situation ... both Parliament and the courts have recognized the need for special protection for youths. On the other hand, when it comes to driving offences and the provision of breath samples, neither Parliament nor the courts have granted special rights to young persons.⁸⁹

Leaving aside the breathalyzer cases, the courts have recognized the vulnerability of youth when youths are being investigated for crimes. Although the jurisprudence reveals a degree of vagueness in the weight to be given to this factor, police are expected to afford greater respect for the Charter rights of youth, or the Crown may find that wrongfully obtained evidence will be excluded.

4. A Youth’s Sense of Time: Trial within a “Reasonable Time” (Charter Section 11(b))

Parliament and the courts have recognized that adolescents have a “different sense of time” than adults. The courts have accepted that youth is a factor to take into account in applying the Charter section 11(b) guarantee to the right to a trial within a reasonable time. In the 1991 Ontario Court of Appeal decision in *R. v. M. (G.C.)*, a case decided under the YOA,⁹⁰ Osbourne J.A. stated:

In my opinion, the general principles set out in *Askov* ... apply to young offenders. *There is a particular need to conclude youth court proceedings without unreasonable delay*, consistent with the goals of the

⁸⁹ [2004] A.J. No. 889, at para. 20 (Alta. Q.B.). Leave to appeal refused [2004] A.J. No. 1372 (Alta. C.A.) and [2005] S.C.C.A. No. 138 (S.C.C.), though the appeal courts did not deal with this issue.

⁹⁰ R.S.C. 1985, c. Y-1.

Young Offenders Act and the principles upon which it is based. *I do not, however, view young persons as being entitled to a special constitutional guarantee to trial within a reasonable time, which differs in substance from that available to adults.* Nonetheless, it seems to me that, as general proposition, youth court proceedings should proceed to a conclusion more quickly than those in the adult criminal justice system. *Delay, which may be reasonable in the adult criminal justice system, may not be reasonable in the youth court.* There are sound reasons for this. They include the well-established fact that the ability of a young person to appreciate the connection between behaviour and its consequences is less developed than an adult's. For young persons, the effect of time may be distorted. If treatment is required ... it is best begun with as little delay as is possible.⁹¹

(emphasis added)

Since that decision was rendered, the YCJA⁹² was enacted, with section 3(1)(b) specifying that:

- (b) the criminal justice system for young persons must be separate from that of adults and emphasize the following...
 - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
 - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

There have been more recent appellate judgments which have held that this provision was intended to "simply codify and make explicit what was recognized in the earlier jurisprudence", in particular *R. v. M. (G.C.)*,⁹³ and have reversed youth court decisions that ordered a stay.⁹⁴ While status as a youth is clearly only one factor in deciding whether to issue a stay, there have also been cases in which this would appear to have been the decisive factor. In the brief 2005 decision *R. v. H. (M.)*,⁹⁵ the Ontario Court of Appeal upheld the order of the youth court judge to issue a stay almost two years after charges had been laid, observing that

⁹¹ [1991] O.J. No. 885, 3 O.R. (3d) 223 at 230 (Ont. C.A.).

⁹² S.C. 2002, c. 1.

⁹³ [1991] O.J. No. 885, 3 O.R. (3d) 223 (Ont. C.A.).

⁹⁴ *R. v. D. (R.C.)*, [2006] B.C.J. No. 947, at para. 31 (B.C.C.A.), *per* Hall J.A. See also *R. v. R. (T.)*, [2005] O.J. No. 2150, 75 O.R. (3d) 645 (Ont. C.A.); and *R. v. B. (L.)*, [2007] O.J. No. 3290, at para. 87 (Ont. C.A.) (*obiter*).

⁹⁵ [2005] O.J. No. 1585 (Ont. C.A.).

after one year, “the case was already pushing the limits of what could be considered *reasonable for the trial of a young person* on what appeared to be relatively uncomplicated charges. It was incumbent on the system to give this case some priority.”⁹⁶ In its decision, the Court of Appeal noted that “memories fade over time”. Although not explicitly mentioned by the Court, it is notable that memories of children and youths fade more quickly than for adults.⁹⁷ While the courts have recognized youth as a factor in section 11(b) cases, it would be helpful to have a clearer articulation of the weight to be given this factor, and it would be appropriate for this factor to be given significant weight.

5. Youth in Schools: Less Respect for Rights

While the courts have been especially protective of the Charter rights of youth when they are being dealt with by the police, a concern about the “well-being” of children has resulted in courts significantly reducing the rights afforded to youth when they are subject to search and questioning by school officials, who are also a class of state agents.

The leading case on the restricted protections afforded youth in school is the Supreme Court decision in *R. v. M. (M.R.)*.⁹⁸ A junior high school vice-principal received information from other students that the accused, a 13-year-old student, intended to sell drugs at a school dance. When, in response to questioning at the vice-principal’s office, the youth denied that he was in possession of drugs, the vice-principal then searched the youth. Pursuant to school policy, a plain clothes police officer had been called by the vice-principal, and was present but said nothing while the vice-principal spoke to the youth and searched him. The vice-principal seized a cellophane bag containing marijuana and gave it to the constable, who advised the accused that he was under arrest for possession of a narcotic. The youth court judge found that the search violated the youth’s rights under section 8 of the Charter and excluded the evidence, resulting in the acquittal of the youth. The Nova Scotia Court of Appeal ruled that the trial judge had erred in excluding this evidence, a conclusion affirmed by the Supreme Court of Canada.

⁹⁶ [2005] O.J. No. 1585 at paras. 5, 6 (Ont. C.A.).

⁹⁷ N.L. Stein, P.A. Ornstein, B. Tversky & C. Brainerd, eds., *Memory for Everyday and Emotional Events* (Mahwah, NJ: Lawrence Erlbaum Associates, 1997), see esp. 213 -17.

⁹⁸ [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.).

While in *R. v. M. (M.R.)*⁹⁹ the Supreme Court accepted that the vice-principal was an agent of the state, and was obliged to comply with section 8 of the Charter in conducting a search, it also ruled that a school official did not have to meet the standards of a police officer for the conduct of the search. A school official has significant leeway in determining what constitutes “reasonable grounds” for a search, and does not require a warrant to search a student, as long as the official is not acting as “an agent for the police”. In this case, even though a police officer was present during the search, the Court concluded that the vice-principal was not “an agent of the police”. The Court gave school officials significant authority to enforce the rules of the school, even when their acts resulted in the seizure of evidence for use in a criminal prosecution. Justice Cory emphasized the important role of teachers and schools for youth and society:

Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty. To ensure the safety of the students and to provide them with the orderly environment so necessary to encourage learning, reasonable rules of conduct must be in place and enforced at schools.¹⁰⁰

The Court then concluded that, in order to allow school officials to effectively discharge their duties, it is necessary to give them a broader set of powers than those afforded the police. Accordingly, the rights of youth in dealing with those officials are restricted in comparison with the rights that they have in their dealings with police:

[T]eachers and principals must be able to act quickly to protect their students and to provide the orderly atmosphere required for learning. If a teacher were told that a student was carrying a dangerous weapon or sharing a dangerous prohibited drug the parents of all the other students at the school would expect the teacher to search that student. The role of teachers is such that they must have the power to search. ... It follows that their expectation of privacy will be lessened while they attend school... This reduced expectation of privacy coupled with the need to protect students and provide a positive atmosphere for learning clearly indicate that a more lenient and flexible approach should be taken to searches conducted by teachers and principals than would apply to searches conducted by the police.¹⁰¹

⁹⁹ [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.).

¹⁰⁰ *R. v. M. (M.R.)*, [1998] S.C.J. 83, [1998] 3 S.C.R. 393, at para. 1 (S.C.C.).

¹⁰¹ *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393, at para. 47 (S.C.C.).

Thus, youth who are in a school have more restricted Charter rights when being questioned or searched by school officials. However, if the police lead an investigation in a school, they generally are obliged to afford youth the same rights as they would in other settings, as illustrated by the Ontario Court of Appeal in *R. v. M. (A.)*.¹⁰² A high school principal told the local police that they could bring sniffer dogs into the school to search for drugs whenever a dog was available. Two years after the general invitation, but without a specific request to attend that day, three police officers and a sniffer dog arrived at the school and asked for and obtained permission from the principal “to go through the school”. Neither the police nor the principal had specific reason to believe that there were drugs in the school that day. Students were confined in classrooms for up to two hours while the police conducted a search with the dog. After the students’ lockers were searched, the police and the dog went to the school gym, where the dog reacted to a backpack lying next to a wall. A police officer searched the backpack and found marijuana and psilocybin. The owner of the backpack, a student, was charged with possession of drugs for the purpose of trafficking. The youth court judge concluded that there had been a violation of section 8 of the Charter and excluded the evidence under section 24(2), observing: “the rights of every student in the school were violated that day as they were all subject to an unreasonable search.”¹⁰³ The Court of Appeal affirmed this decision, concluding that the sniffing by the dog constituted a search. Further, this was a search by police, but:

[E]ven if this was a search by school authorities through the agency of the police, there is nothing in the *Education Act* ... that gives the required authority to conduct such a search ... ‘To admit the evidence is effectively to strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure.’¹⁰⁴

A Crown appeal to the Supreme Court of Canada was argued on May 22, 2007, with a decision reserved. If the Supreme Court reverses the Court of Appeal, it will mean that students could be subjected to random searches by the police or teachers any time that they are at school.

¹⁰² [2006] O.J. No. 1663, 79 O.R. (3d) 481 (Ont. C.A.), leave to appeal allowed [2006] S.C.C.A. No. 229 (S.C.C.).

¹⁰³ *R. v. M. (A.)*, [2004] O.J. No. 2716, at para. 25 (Ont. C.J.), *per* Hornblower J.

¹⁰⁴ [2006] O.J. No. 1663, 79 O.R. (3d) 481, at paras. 53 and 62 (Ont. C.A.), leave to appeal allowed [2006] S.C.C.A. No. 229 (S.C.C.), in part quoting with approval from the trial judge, Hornblower J., in *R. v. M. (A.)*, [2004] O.J. No. 2716 (Ont. C.J.).

III. CHILDREN AND YOUTH AS VICTIMS AND WITNESSES

1. Special Protections for Child and Youth Witnesses

In a series of amendments to the *Criminal Code*¹⁰⁵ and the *Canada Evidence Act*¹⁰⁶ between 1988 and 2006,¹⁰⁷ Parliament enacted a number of provisions to facilitate the giving of evidence by persons under the age of 18, including legislation allowing youth to testify via closed-circuit television or from behind a screen, to have a support person sit near them while they testify, and to admit into evidence a videotape of a prior interview with the youth. Most recently, the competency test for child witnesses has been substantially reformed, abolishing any inquiry into whether a child can demonstrate understanding of the promise to tell the truth, and creating a presumption of competency for children. The Supreme Court of Canada and lower courts have consistently rejected constitutional challenges to these provisions by accused persons, recognizing that they are constitutionally justified by the special vulnerability of youth and the desire to promote the search for the truth. In upholding the constitutionality of the provision allowing a child to testify from behind a screen in 1993, L'Heureux-Dubé J., writing for a unanimous Supreme Court in *R. v. Levogiannis*, observed:

The plight of children who testify and the role courts must play in ascertaining the truth must not be overlooked in the context of the constitutional analysis in the case at hand. As this Court has said, children may require different treatment than adults in the courtroom setting. ...¹⁰⁸

Accordingly, the Court upheld the constitutionality of this provision, which at that time allowed a judge to permit a child under the age of 18 to testify outside the courtroom in cases involving specified sexual offences, provided that the judge was satisfied that this was “necessary in order for the child to give a full and candid account of the acts complained of”. The Court rejected arguments by the accused that this violated his right to a fair trial, as guaranteed by sections 7 and 11(d) of the Charter. In

¹⁰⁵ R.S.C. 1985, c. C-46.

¹⁰⁶ R.S.C. 1985, c. C-5.

¹⁰⁷ See discussion in Nicholas Bala, “Double Victims: Child Sexual Abuse and the Criminal Justice System” (1990) 15 Queen’s L.J. 3; Nicholas Bala, “Increasing Protections for Women and Children: Bills C-126 & 128” (1993) 21 C.R. (4th) 365; and Nicholas Bala, Katherine Duvall-Antonopoulos, Rod Lindsay, Kang Lee & Victoria Talwar, “Bill C-2: A New Law for Canada’s Child Witnesses” (2006) 32 C.R. (6th) 48.

¹⁰⁸ [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475, at para. 15 (S.C.C.). For a similar American decision, see *Maryland v. Craig*, 497 U.S. 836 (1990).

coming to this conclusion, the Court accepted that there must be some “balancing” of the rights of accused persons and the interests of children:

Section 486(2.1) of the *Criminal Code* has been carefully worded to protect the rights of accused, while at the same time facilitating the giving of evidence by young victims of sexual abuse of varying kinds. ...

Parliament has devised s. 486(2.1) in such a way as to *properly balance* the goal of ascertaining the truth and the *protection of children as well as the rights of accused* to a fair trial by allowing cross-examination and by tailoring the use of screens to the complainants’ age and confining their use to limited and specific types of crimes.¹⁰⁹

The 2006 enactment, section 486.2(1) of the *Criminal Code*,¹¹⁰ considerably expanded the scope of this provision, stipulating that if an application is made by prosecutor or child, the judge “shall” make an order to allow the child to testify from behind a screen or via closed-circuit television, “unless the judge ... is of the opinion that the order would interfere with the proper administration of justice”. This statutory exception is narrow,¹¹¹ and might, for example, be invoked if the equipment available did not give the accused, judge and jury a good view of the child, or if there was inadequate provision for private communication between the accused and his or her counsel. Significantly, there is no longer a requirement for the Crown to establish that use of this provision is necessary for a child to give a “full and candid account of the acts complained of”.¹¹² The constitutionality of the new provision was upheld by Dhillon Prov. Ct. J. in *R. v. H. (C.N.)*,¹¹³ where she observed that “there is a valid legislative basis for requiring the presumptive or mandatory order, given the lack of success in affording aids to child witnesses under the predecessor legislation.” She concluded that this provision was consistent with the rights of an accused to a fair trial, as the court retained the authority to decline to use a screen or closed-circuit television if

¹⁰⁹ [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475, at paras. 40-41 (S.C.C.).

¹¹⁰ R.S.C. 1985, c. C-46.

¹¹¹ A number of cases under the 2006 provision have emphasized that it is much easier to satisfy the test for use of closed-circuit television. For example, in *R. v. Elmer*, [2006] B.C.J. No. 585 (B.C. Prov. Ct.) Godfrey Prov. Ct. J. observed that the previous provision set out a “different and higher standard”.

¹¹² Although beyond the scope of this article, it should be noted that the 2006 provisions also allow for a vulnerable adult to testify by closed-circuit television, but for this to occur the Crown must satisfy the court that it is “necessary to obtain a full and candid account” from the witness, as might, for example, occur in some domestic violence cases: see *Criminal Code*, R.S.C. 1985, c. C-46, s. 486.2(2), enacted S.C. 2005, c. 32, s. 15.

¹¹³ [2006] B.C.J. No. 782 (B.C. Prov. Ct.).

doing so would “interfere with the proper administration of justice”. While the 2006 provision is significantly broader than the original provision, which was upheld by the Supreme Court in 1993 in *R. v. Levogiannis*,¹¹⁴ it seems highly likely that higher courts will follow the approach of Dhillon Prov. Ct. J. in *R. v. H. (C.N.)* and uphold the constitutionality of the new provision.¹¹⁵

In its 1993 decision in *R. v. L. (D.O.)*,¹¹⁶ the Supreme Court of Canada upheld the constitutional validity of section 715.1, which allowed for a court to admit a video-recording of an investigative interview with a child about a sexual offence, provided that the child testified and adopted the statements, and was therefore available for cross-examination. Chief Justice Lamer recognized the vulnerability of children and youth, and their dominance by adults, and concluded that the provision was:

a response to the dominance and power which adults, by virtue of their age, have over children. Accordingly, s. 715.1 is designed to accommodate the needs and to safeguard the interests of young victims of various forms of sexual abuse, irrespective of their sex. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.¹¹⁷

As with other child witness-related provisions, section 715.1 was amended in 2006 to apply to any offence, and to create a presumption that a video-recording will be admitted into evidence, unless the court is “of the opinion that admission of the video-recording ... would interfere with the proper administration of justice”. Although there are no reported decisions on the constitutionality of this new provision, it seems likely that it too will be considered to be consistent with the Charter, even though this would involve an extension of the reasoning of *L. (D.O.)*.

Until 2006, a young child was permitted to testify only if the court was satisfied that the child understood the significance of the “promise to tell the truth” and had the “ability to communicate the evidence”.¹¹⁸ In 2006 *Canada Evidence Act* section 16.1 came into force, creating a

¹¹⁴ [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475 (S.C.C.).

¹¹⁵ See *R. v. S. (J.)*, [2007] B.C.J. No. 1374 (B.C.S.C.), *per* Metzger J., which cited and relied upon *R. v. H. (C.N.)*, [2006] B.C.J. No. 782 (B.C. Prov. Ct.).

¹¹⁶ [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419, at para. 1 (S.C.C.).

¹¹⁷ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419, at 428 (S.C.C.).

¹¹⁸ *Canada Evidence Act*, R.S.C. 1985, c. C-5; and *R. v. F. (W.J.)*, [1999] S.C.J. No. 61, [1999] 3 S.C.R. 569 (S.C.C.).

presumption that all witnesses “have the capacity to testify”. While children are required to “promise to tell the truth” before being permitted to testify, section 16.1(8) specifies that no child shall be “asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court”. A party who is challenging the competence of a child to testify bears the onus of satisfying that there is a genuine issue about the child’s ability to communicate in court, and if there is an inquiry, the sole test for competence is whether the child is “able to understand and respond to questions”.¹¹⁹ Trial courts have held that the new process and test for assessing the competence of child witnesses in the 2006 law are consistent with the rights of an accused to a fair trial, and with the principles of fundamental justice. In rejecting a Charter challenge to the new provision, Antifaev Prov. Ct. J. reviewed the psychological research that supported the enactment of the new law, and concluded: “The question really is not whether the child understands the duty of telling the truth or can articulate that duty, but whether the child is in fact telling the truth.”¹²⁰

The decisions upholding the constitutionality of the criminal laws that afford child and youth witnesses special protections reflect the fact that the courts recognize the unique and vulnerable nature of this stage of life, and are, in effect, prepared to afford it a special constitutional status.

2. Correctional Use of Force — Lesser Protection within the Family

Parents are given a broad range of powers at common law and under legislation to make decisions affecting their children and to control their lives. Further, it has been accepted that under the Charter, some parental rights are aspects of a parent’s “security of the person”, and hence entitled to constitutional protection, in particular when the state is threatening a parental relationship with a child in protection proceedings.¹²¹ It has also been accepted by the courts that children have a constitutional right to “liberty and security of the person”, which they may assert in some situations in their own capacity. Accordingly, both parents and children

¹¹⁹ R.S.C. 1985, c. C-5, as amended by S.C. 2005, c. 32, s. 27.

¹²⁰ *R. v. S. (M.)*, unreported, (August 31, 2006) B.C. Prov. Court (Youth Court) File No. 77401. The same conclusion was reached in *R. v. Persaud*, [2007] O.J. No. 432 (Ont. S.C.J.), *per* Epstein J.; and *R. v. S. (J.)*, [2007] B.C.J. No. 1374 (B.C.S.C.), *per* Metzger J.

¹²¹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

have the right to have state *intervention* under child welfare laws only “in accordance with the principles of fundamental justice”. It is only once a court has determined that the state has proven that there is sufficient evidence of parental abuse, neglect or incapacity that the constitutional rights of children and their parents may start to diverge in a child welfare proceeding. There are some situations in which the rights of children and parents must be balanced against each other, as illustrated by *Canadian Foundation for Children*.¹²² This 2004 decision of the Supreme Court of Canada upheld the constitutional validity of section 43 of the *Criminal Code*,¹²³ which allows parents to use reasonable force on children “for the purpose of correction”. The Court observed that section 7 of the Charter can only be invoked when a *state action* curtails the liberty or security of the person of a child, so that a child could not, for example, invoke the Charter to bring a court application to compel parents to do something. However, the Court accepted that to the extent that parents are relying on a state-enforced legal regime to exercise powers over their children, the legal regime must be consistent with the Charter. The Supreme Court recognized that parents should be given a significant degree of autonomy to raise their children as they see fit.

While accepting that children are clearly a “highly vulnerable group” and hence entitled to the protection of section 15 of the Charter, the majority of the Court also held that section 43 of the *Criminal Code*¹²⁴ corresponds to “actual needs and circumstances of children”, and hence does not “discriminate” against children.¹²⁵ In coming to this conclusion, McLachlin C.J.C., writing for a majority of the Court, emphasized the importance of respecting the role and rights of parents to make decisions about how to raise their children.

Children need to be protected from abusive treatment. They are vulnerable members of Canadian society ... the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents ... for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family ... is essential to this growth process.

¹²² *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

¹²³ R.S.C. 1985, c. C-46.

¹²⁴ R.S.C. 1985, c. C-46.

¹²⁵ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 56 (S.C.C.).

Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children ... [but introducing] the criminal law into children's families and educational environments in [non-abusive] circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.

This decision, far from ignoring the reality of children's lives, is grounded in their lived experience... The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.¹²⁶

Although affording constitutional recognition to some of the rights of parents, the Court did circumscribe the authority of parents, ruling that any corporal punishment that is used on a child could only result in “transitory and trifling” pain. While permitting teachers to use reasonable force to restrain a child or youth, the majority concluded that the “[c]ontemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable”.¹²⁷ Further, the Supreme Court recognized that children and teenagers have different needs and capacities, and in some contexts should have different legal treatment, ruling that corporal punishment of teenagers by either parents or teachers is not protected by section 43 of the *Criminal Code*,¹²⁸ although this provision can be invoked to use force to restrain or control a youth.

The decision in *Canadian Foundation for Children*¹²⁹ was controversial, with critics arguing that it gives insufficient protection to the rights *and* welfare of children and youth,¹³⁰ and I share some of the

¹²⁶ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at paras. 58-62 (S.C.C.).

¹²⁷ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 38 (S.C.C.).

¹²⁸ R.S.C. 1985, c. C-46.

¹²⁹ *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

¹³⁰ There were dissents by Arbour J., Deschamps J. and Binnie J. (in part). For commentaries on the decision, see S. Anand, “Reasonable Chastisement: A Critique of the Supreme Court’s Decision

disappointment with the decision, in particular the dismissal of the notion that the “best interests of the child” is one of the “principles of fundamental justice”.¹³¹ It is, however, significant that the majority of the Court clearly recognized that childhood and youth are different from adulthood. While in this context this meant that there was a curtailment of protections otherwise afforded by the criminal law, the distinction was made because the Court believed that it would promote the interests of children and youth within their families and schools, and accordingly there may be other legal contexts in which this decision might be cited as the basis for an argument that the rights of youth should be protected.

IV. CONCLUSION: THE CONSTITUTIONALIZATION OF YOUTH

Legislation and jurisprudence in Canada have recognized that those under the age of 18 are not adults and have a special legal status; this reflects their developmental stage and vulnerability, and is consistent with the *Convention on the Rights of the Child*.¹³² For some criminal law issues, most notably in regard to youthful offenders being dealt with by the police and youthful witnesses in the criminal courts, this is reflected in interpretations of the Charter which afford youth special protections. In other contexts, however, most notably in governing the relationship of youth to parents and teachers, the Charter has been interpreted in a way that affords youths fewer rights than adults, albeit with the judicially articulated intent of promoting the welfare of youth.

Although often not well articulated by the courts, it is clear that Canadian courts, led by the Supreme Court, have in effect given constitutional recognition to the status of youth. As discussed in this paper, the future Supreme Court decision in *R. v. B. (D.)*¹³³ will address the constitutionality of the provisions of the YCJA¹³⁴ that presumptively impose an adult sentence on youth found guilty of the most serious

in the ‘Spanking’ Case” (2004) 41 Alta. L. Rev. 879; K. Sykes, “Bambi Meets Godzilla: Children’s and Parents’ Rights in Canadian Foundation for Children, Youth and the Law v. Canada” (2006) 51 McGill L.J. 131; M. Bernstein, “The Decision of the Supreme Court of Canada Upholding the Constitutionality of Section 43 of the Criminal Code of Canada: What this Decision Means to the Child Welfare Sector” (2006) 44 Fam. Ct. Rev. 104; and J. Mosoff & I. Grant, “Upholding Corporal Punishment: For Whose Benefit?” (2005) 31 Man. L.J. 177.

¹³¹ Nicholas Bala, “The Charter of Rights and Child Welfare”, Law Society of Upper Canada, *Basic Procedure for Handling a Child Protection File*, Toronto, March 9, 2004.

¹³² Can T.S. 1992 No. 3.

¹³³ [2006] O.J. No. 1112, 37 C.R. (6th) 265 (Ont. C.J.).

¹³⁴ S.C. 2002, c. 1.

offences. I have argued that the approach most consistent with the existing jurisprudence and the *Convention on the Rights of the Child*¹³⁵ will be for the Court to recognize the constitutionalization of youth, and rule invalid the challenged provisions. It is to be hoped that the Supreme Court will send a clear signal about the importance of youth as a factor in Charter analysis, and that its decision will eventually affect how other issues are dealt with by the courts.

¹³⁵ Can. T.S. 1992 No. 3.